SUPREME COURT, U.S.
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In The
Supreme Court of the United States

OFFICE OF THE CLERK

KENNETH RAY HYATT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a federal defendant presents newly discovered, expert evidence of malfeasance and false investigation by government agents involving flood insurance for hurricane repairs that likely have caused jury to acquit him, giving rise to "the imperative of correcting a fundamentally unjust conviction," *House v. Bell*, 547 U.S. 518, 536 (2006), does the district court's dismissal of a motion to vacate under 28 U.S.C. § 2255(4), after it assumed the defendant acted with due diligence, raise an important question of federal law worthy of a certificate of appealability under *Miller-El v. Cockrell* and *Tennard v. Dretke*?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vi

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF THE CASE 3

A. Procedural History 3

B. Summary of Evidence at Trial 5

C. Summary of Newly Available Evidence 8

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW 11

REASONS WHY A WRIT SHOULD BE GRANTED 12

I. THE FOURTH CIRCUIT IMPROPERLY DENIED A CERTIFICATE OF APPEALABILITY UNDER *MILLER-EL v. COCKRELL* AND *TENNARD v. DRETKE* WHERE KENNETH HYATT PRESENTED NEWLY DISCOVERED EXPERT EVIDENCE OF GOVERNMENTAL MALFEASANCE, FAULTY INVESTIGATION, AND FALSE TESTIMONY THAT WOULD LIKELY HAVE CAUSED THE JURY TO ACQUIT HIM, RAISING AN IMPORTANT ISSUE OF FEDERAL LAW WORTHY AND CREATING AN INTER-CIRCUIT DISPUTE REGARDING CERTIFICATES OF APPEALABILITY THAT THIS COURT MUST SETTLE 12

A. This Court should address the question of whether a petitioner is entitled to meaningful review of his application for a certificate of appealability 13

B. Mr. Hyatt met the low threshold for a certificate of appealability 17

C. The New Evidence That Would Have Resulted in a Different Verdict 20

D. Mr. Hyatt Could Not Reasonably Have Discovered This Evidence at an Earlier Time 24

E. The Lower Court Erred in its Evaluation of the New Evidence 26

CONCLUSION 32

APPENDIX

Unpublished Opinion of
The United States Court of Appeals
For The Fourth Circuit
entered October 2, 2009 ..... App. 1a

Judgment of
The United States Court of Appeals
For The Fourth Circuit
entered October 2, 2009 ..... App. 4a

Judgment of
The United States District Court
For The Eastern District of North Carolina
entered August 18, 2008 ..... App. 5a

Order of
The United States District Court
For The Eastern District of North Carolina
Re: Allowing Government's
Motion to Dismiss
entered August 18, 2008 ..... App. 7a

Defendant's Motion to Vacate,
With Attachments,
entered November 20, 2006 ..... App. 14a

Unpublished Opinion of
The United States Court of Appeals
For The Fourth Circuit
entered December 22, 2003..... App. 68a

TABLE OF AUTHORITIES

Page(s)

CASES

Avon v. United States,
291 F.3d 708 (11th Cir. 2002) 26

Barefoot v. Estelle,
463 U.S. 880 (1983) 14, 15

Bates v. Lee,
308 F.3d 411 (4th Cir. 2002) 16

DiCenzi v. Rose,
452 F.3d 465 (6th Cir. 2006) 27

Easterwood v. Champion,
213 F.3d 1321 (10th Cir. 2000) 26

Engle v. Isaac,
546 U.S. 107 (1977) 14, 22

Flournoy v. McKune,
266 Fed. Appx. 753 (10th Cir. 2008)...13, 14, 16

Hasan v. Galaza,
254 F.3d 1150 (9th Cir. 2001) 19

House v. Bell,
547 U.S. 518 (2006) .....*passim*

Humphries v. United States,
2007 WL 1892114 (6th Cir. 2007).....19

Lewis v. McGinnis,
04-cv-32 (2d Cir., 29 August 2008) 15

Locasico v. United States,
395 F.3d 51 (2d Cir. 2005) 26

Medellin v. Dretke,
371 F.3d 270 (5th Cir. 2004) 13, 14, 16

Miller-El v. Cockrell,
537 U.S. 322 (2003) ..... *passim*

Moore v. Knight,
368 F.3d 936 (7th Cir. 2004) 25-26

Mueller v. Angelone,
181 F.3d 557 (4th Cir. 1999) 16

Raines v. United States,
423 F.2d 526 (4th Cir. 1970) 19

Rivas v. Fischer,
294 Fed. Appx. 677 (2d Cir. 2008) 2

Schlup v. Delo,
513 U.S. 298 (1995) ..... *passim*

Slack v. McDaniel,
529 U.S. 473 (2000) 5, 12, 14, 17

Tennard v. Dretke,
542 US. 274 (2004) 1, 12, 17

United States v. Kennelly,
84 Fed. Appx. 278 (4th Cir. 2003)
(unpublished), *cert. denied*,
541 U.S. 1018 (2004) 3

Wims v. United States,
225 F.3d 186 (2d Cir. 2000) 26

CONSTITUTIONAL PROVISION

U.S. CONST. amend. V 3

STATUTES

18 U.S.C. § 371 3

18 U.S.C. § 1341 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2253 16

28 U.S.C. § 2253(c)(1)(A) 16

28 U.S.C. § 2255 ..... 8, 19, 20, 26

28 U.S.C. § 2255(4) ..... *passim*

RULES

FED. R. APP. P. 12(b)(1) 4

FED. R. APP. P. 22(b)(1) 5

No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term 2009

KENNETH RAY HYATT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Petitioner, Kenneth Ray Hyatt, respectfully requests this Court to issue a writ of certiorari to review the order of the United States Court of Appeals for the Fourth Circuit denying his application for a certificate of appealability and dismissing his appeal in this case. The Fourth Circuit's perfunctory denial of a certificate of appealability is inconsistent with the principles espoused in *Tennard v. Dretke* and *Miller-El v. Cockrell* and highlights a division among the circuits

with respect to the treatment of a request for a certificate of appealability. Moreover, the substantive claim concerns an important issue of the materiality of a federal defendant's newly discovered evidence necessary to satisfy the threshold for filing a motion to vacate under 28 U.S.C. § 2255(4). *See Rivas v. Fischer*, 294 Fed. Appx. 677 (2d Cir. 2008) (directing district court to examine credibility of government witnesses and relative strength of state's case); *see also House v. Bell*, 547 U.S. 518 (2006) (acknowledging newly discovered evidence may arise creating imperative to correct unjust conviction). To resolve this important question of federal law and create consistency among the circuits regarding when and how a certificate of appealability must be granted, this Court should issue its writ to resolve the issue.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *Hyatt v. United States*, No. 08-8455, is unpublished and attached. [App. 1a-3a] The unpublished order of the United States District Court for the Eastern District of North Carolina denying a motion to vacate based on compelling, newly discovered evidence is attached. [App. 7a-13a]

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on 2 October 2009. [App. 4a] This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., amend. V provides, in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Procedural History.

Kenneth Hyatt was convicted by a jury of conspiring to defraud the United States and mail fraud. *See* 18 U.S.C. §§ 371, 1341. It was affirmed. *United States v. Kennelly*, 84 Fed. Appx. 278 (4th Cir. 2003)(unpublished), *cert. denied*, 541 U.S. 1018 (2004). [App. 68a-72a]

After his release from incarceration, Mr. Hyatt first learned of an investigation and report to Congress done by Steven J. Kanstoroom, an expert in Pattern Recognition and Fraud Detection. Mr. Kanstoroom conducted a two-year investigation, involving over 6,000 hours of research and analysis, into the Federal Emergency Management Agency (FEMA) and many of its related entities that resulted in a comprehensive, written report to the Congressional Research Service. [App. 37a-40a, 43a-67a] As part of his investigation, Mr. Kanstoroom received "whistleblower" and "smoking gun" documents that "demonstrate[d] systemic problems within FEMA," including the intentional use of "low-ball" adjustments and the perpetration of "materially false and misleading information" that formed the basis for operations, audits, and prosecutions. [App. 30a-31a, 44a-46a] Among other

things, he found "government witnesses" gave "false and misleading testimony" to both the prosecuting authorities and to the district court that contributed to Mr. Hyatt's "wrongful conviction." [App. 51a-54a] Mr. Kanstoroom "believe[d] the evidence . . . could not have been found using reasonable diligence by the parties." [App. 31a, 66a-67a]

Based on this newly available and discovered information, Mr. Hyatt filed a motion to vacate the judgment. *See* 28 U.S.C. § 2255(4). The government moved to dismiss for lack of jurisdiction, *see* Fed. R. App. P. 12(b)(1), but did not dispute, in any way, Mr. Kanstoroom's position. Rather, the government moved to dismiss only on the basis of untimeliness. The district court "[a]ssum[ed] without deciding" that Mr. Hyatt exercised "due diligence," [App. 12a], but dismissed it because the newly discovered information was not "material to the issues," (without affording Mr. Hyatt any opportunity to respond and without conducting an evidentiary hearing), and, therefore concluded the motion was untimely. [App. 12a] The district court summarily characterized the new information as a "vague proffer," [App. 12a] despite the uncontested qualifications of Mr. Kanstoroom and his comprehensive, unchallenged report's indictment of

the government's theory, investigation, and testimony.[1] [App. 43a-67a]

Mr. Hyatt timely appealed. The Fourth Circuit summarily denied a certificate of appealability. *See* Fed. R. App. P. 22(b)(1). Like the district court, the Fourth Circuit dismissed the appeal without discussing why the issue Mr. Hyatt "presented [was not] adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. at 327 (citing *Slack v. McDaniel*, 529 U.S. 473, 481 (2000).

B. Summary of Evidence at Trial.

Ocean Dunes is a residential condominium complex at Kure Beach, North Carolina, consisting of twenty-five buildings with 196 separate units. These condominiums were devastated by Hurricane Fran in 1996. Concrete driveways and carports were torn apart. Sand beneath the buildings had been washed away, leaving holes as great as ten feet.

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[1]Even a cursory review of Mr. Kanstoroom's extremely detailed, focused, and documented report, which is found in full at App. 43a-67a, belies the district court's characterization of this compelling new evidence as a "vague proffer." The entire report was attached to the motion to vacate filed in the district court. [App. 14a-67a] Based on this presentation and the district court's unsupportable rejection of it, Mr. Hyatt certainly "deserve[d] encouragement to proceed further" with this claim in the Fourth Circuit. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Indeed, it offends even rudimentary notions of due process that a conviction would be allowed to stand in the face of this dramatic development, especially without the district or circuit court reviewing this issue on the merits. *See House v. Bell*, 547 U.S. 518, 536 (2006).

Wooden walls forming carports underneath the buildings had been shredded.

In the wake of the storm, insurance adjusters and contractors from around the nation came to North Carolina to get work rebuilding the area. The Ocean Dunes Homeowners Association began the insurance process for the Ocean Dunes condominium complex. Insurance Network Services (INS) retained approximately fifty independent claims adjusters to work on Fran-related insurance claims in the Wilmington area, including Donald Kennelly, who, because he was certified in all lines of flood insurance and had significant experience, was assigned 150 claims, including the Ocean Dunes claim, which was the largest. Although INS posted pricing guides in its office and distributed copies of guidelines received by National Flood Insurance Program, it did not give adjusters additional tools or aids for use in adjusting claims.

Meanwhile, Tim Price and Ken Hyatt came to the Wilmington area to obtain work repairing hurricane damage to property covered by insurance after the hurricane struck. Mr. Price and Mr. Hyatt became equal partners in Coastal Insurance Repairs, Inc. Coastal obtained an unlimited contractor's license in North Carolina. The new license enabled Coastal to obtain large jobs. The Ocean Dunes Homeowners Association selected Coastal to perform repairs.

By May 1998, Coastal had completed, with the exception of few final repairs, the reconstruction of Ocean Dunes. After determining that the work was

completed to the satisfaction of the homeowners, the Homeowners Association paid Coastal out of its general account.

At trial, the government introduced evidence relating to the scope of flood insurance and the price of labor and material. Through this evidence, the government claimed some of Mr. Kennelly's proofs of loss were improperly inflated through the use of unrealistically high prices for certain items included within them. The government's opinion witness, Thomas Vaughan, testified about the scope of flood insurance and the price of labor and materials. In preparation to testify about the prices of various repair items, Vaughan reviewed Ocean Dunes files received from the government but did not review the NFIP material or research the prices available in the aftermath of Fran. Rather, Vaughan simply remembered the prices he used when he worked as an adjuster after Fran, six years before the trial.

Ty Mueller, an agent with the Inspector General for FEMA, compared estimates produced by Mr. Kennelly during the claims process with bids provided by subcontractors. During Agent Mueller's testimony, while entertaining an objection from Mr. Hyatt, the district court began discussing with counsel its concerns regarding the government's meager proof of a conspiracy.

At the close of the government's case, Mr. Hyatt moved for a judgment of acquittal because the evidence was insufficient. Although the district court twice noted the "paucity of the evidence" of a connection between the defendants, it denied the

motions. Mr. Hyatt renewed his motion at the close of all the evidence. The district court again noted the "paucity of the evidence" and described the motion as a "very, very close call" but denied it.[2]

C. Summary of Newly Available Evidence.

The newly discovered evidence involves the result of an investigation by and report of Steven J. Kanstoroom, who is an expert in Pattern Recognition and Fraud Detection. [App. 33a-36a] In a letter dated 19 November 2005 to Rawle King, Insurance Analyst with Congressional Research Service, Mr. Kanstoroom describes a two-year investigation he conducted into FEMA and many of its related entities. [App. 29a-32a] As part of his investigation, Mr. Kanstoroom received "whistleblower" and "smoking gun" documents. In his expert opinion, Mr. Kanstoroom believed this information "demonstrates systemic problems within FEMA," including the intentional use of "low-ball" adjustments and the perpetration of "materially false and misleading information" that formed the

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[2]This district court's repeated description of the "paucity of the evidence" is important because it rejected Mr. Hyatt's claim of newly discovered evidence and denied the motion to vacate under section 2255 because it was merely cumulative of the cross-examination during the trial. If the evidence was as paltry as the district court believed when it heard the testimony, it is difficult to fathom how the same district court could consider Mr. Kanstoroom's detailed expert observations, which resulted from 6,000 hours of research, investigation, and analysis, and was a stunning indictment of the substance and legitimacy of the government's entire case against Mr. Hyatt, to have been immaterial under section 2255.

basis for operations, audits, and prosecutions, including "that key governments witnesses came to provide the false and misleading testimony" in Mr. Hyatt's trial. In Mr. Kanstoroom's expert opinion, the absence of this important evidence, which substantially disputed the government's claims of fraud and over-pricing, contributed to Mr. Hyatt's "wrongful conviction." He also felt Mr. Hyatt or his defense team could not have gathered this important evidence through the exercise of reasonable diligence.

Mr. Kanstoroom prepared a "Summary of Newly Discovered Evidence in the Case of the United States of America v. Donald Kennelly and Kenneth Ray Hyatt," dated 19 November 2005, that he submitted to the Congressional Research Service. [App. 43a-67a] This significant report contains findings that are unquestionably material to Mr. Hyatt's defense of the charges for which he was convicted. For example, Mr. Kanstoroom determined government witnesses mistakenly and erroneously testified that FEMA and its entities pay only for damages caused by direct water contact. This material information was incorrect. Similarly, he concluded government witnesses mistakenly and erroneously testified that amounts paid to Mr. Hyatt exceeded permissible amounts or were unreasonably high. This misinformation resulted from FEMA's intentional use of "low-ball" estimates. Government witnesses also inaccurately testified about water contact and pricing guidelines and gave the jury materially incorrect information about Mr. Hyatt in this regard. In fact, water contact is not a prerequisite for payment to cover hurricane and

flood damage at the time of Mr. Hyatt's work, contrary to the explicit testimony of several government witnesses. This erroneous testimony was particularly important because of the issue relating to the number of air conditioning units that were replaced based on whether they had been in direct contact with flood waters caused by the hurricane.

Furthermore, Mr. Kanstoroom found that much of the key testimony and evidence against Mr. Hyatt came from people without any training as an adjuster. This lack of training would have been pivotal to the weight the jury would have assigned the testimony. He also found the automated software programs used by FEMA and its agents to determine prices for reconstruction and replacement prices used in the industry were not uniform or even consistent. This new information was directly contrary to the explicit testimony of key government witnesses. Rather, there is "a wide variation in prices that amounts to hundreds of percent." Mr. Kanstoroom found "such programs are often used to low-ball insurances claims" and provides the rationale for these tactics. As a result, "the adjusters' 'approved prices' are often far lower than the fair price necessary to complete the repairs." These practices are "fraudulent." [App. 36a] Mr. Kanstoroom also "found it very common for contractors [like Mr. Hyatt] to agree to perform work for whatever the insurance adjuster writes." This approach by Mr. Hyatt, which mirrored the routine and accepted practice in the industry, formed a central aspect of the government's inferential claim that he acted fraudulently.

This newly discovered evidence found by Mr. Kanstroroom bore directly on both the quality and credibility of the government's case against Mr. Hyatt. It is not merely cumulative of impeachment and other defense efforts.

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Mr. Hyatt presented this newly discovered evidence in a motion to vacate properly filed within one year of his discovery of the evidence found by Mr. Kanstroroom. [App. 14a-67a] The district court dismissed his motion as untimely under 28 U.S.C. § 2255(4) without an evidentiary hearing, essentially concluding that the new evidence was not material to the case. [App. 7a-13a] The Fourth Circuit denied his request for a certificate of appealability in a perfunctory one-paragraph opinion containing no analysis, despite the request presenting issues about which reasonable jurists have disagreed. [App. 2a-3a] Thus, the federal questions were raised and rejected on the merits. They are properly presented to this Court for review.

REASONS WHY A WRIT SHOULD BE GRANTED

I. THE FOURTH CIRCUIT IMPROPERLY DENIED A CERTIFICATE OF APPEALABILITY UNDER *MILLER-EL v. COCKRELL* AND *TENNARD v. DRETKE* WHERE KENNETH HYATT PRESENTED NEWLY DISCOVERED EXPERT EVIDENCE OF GOVERNMENTAL MALFEASANCE, FAULTY INVESTIGATION, AND FALSE TESTIMONY THAT WOULD LIKELY HAVE CAUSED THE JURY TO ACQUIT HIM, RAISING AN IMPORTANT ISSUE OF FEDERAL LAW WORTHY AND CREATING AN INTER-CIRCUIT DISPUTE REGARDING CERTIFICATES OF APPEALABILITY THAT THIS COURT MUST SETTLE.

Kenneth Ray Hyatt sought review in the Fourth Circuit of the district court's denial of his motion to vacate, which was based on compelling and material newly discovered evidence that the district court acknowledged could not have been discovered with due diligence. The Fourth Circuit denied him a certificate of appealability in a one-paragraph, summary "opinion," containing no analysis of the issue. [App. 2a-3a] The Fourth Circuit's perfunctory denial of a certificate of appealability is at odds with the teachings of this Court, *see Tennard v. Dretke*, 542 US. 274, 282 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 481 (2000),

and contrary to the practice in at least the Fifth and Tenth Circuits. *See Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004); *Flournoy v. McKune*, 266 Fed. Appx. 753 (10th Cir. 2008). This Court should review the Fourth Circuit's practice of summarily denying certificates of appealability and resolve the division among the circuits on this matter. In particular, this Court should intervene where the denial of a certificate of appealability forecloses review of a motion to vacate based on compelling new evidence that made it more likely than not that no reasonable juror would have found Mr. Hyatt guilty beyond a reasonable doubt. *See House v.* Bell, 547 U.S. 518, 536 (2006); *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

A. This Court should address the question of whether a petitioner is entitled to meaningful review of his application for a certificate of appealability.

This Court has clearly stated the standard for granting a certificate of appealability. While its issuance is not automatic, a petitioner seeking to appeal from the denial of a petition for wit of habeas corpus "need only demonstrate a 'substantial showing of the denial of a constitutional right.'"

Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).[3] A reviewing court may not deny a certificate of appealability on the grounds that the petitioner will not succeed on the merits. Rather, a certificate of appealability should be granted where the petitioner has "demonstrate[ed] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.*, citing *Slack v. McDaniel*, 529 U.S. 473, 481 (2000). In other words, a "court of appeals should be confident that petitioner's claim is squarely foreclosed by statute, rule or authoritative court decision, or is lacking any factual basis in the record . . . before dismissing it as frivolous." *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983).

The circuits are split as to the degree of analysis given to denials of habeas petitioners' applications for certificates of appealability. The Fifth and Tenth Circuits fully state their reasons for denying COA. *See, e.g., Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), *Flournoy v. McKune*, 266 Fed. Appx. 753 (10th Cir. 2008). The summary opinion

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[3]It is difficult to imagine a more substantial denial of a constitutional right than to have a conviction go unreviewed in the face of "new reliable evidence . . . that was not presented at trial," *Schlup*, 513 U.S. at 324, given "the imperative of correcting a fundamentally unjust conviction." *House*, 547 U.S. at 536 (quoting *Engle v. Isaac*, 546 U.S. 107, 129 (1977)).

from the Fourth Circuit here stands in sharp contrast.[4]

The standards applied by the circuits in denying a certificate of appealability are subject to review by this Court. For example, in *Miller-El*, this Court held that the Fifth Circuit Court of Appeals erred in (1) reaching the merits of the claim before issuing its certificate of appealability, and (2) applying too stringent a standard in reviewing the petitioner's claim. *Miller-El*, 537 U.S. at 341-42. Here, this Court has no opportunity to review the Fourth Circuit's decision as it is impossible to discern why it denied Mr. Hyatt's application for a certificate of appealability. Nothing indicates the Fourth Circuit found his claim "squarely foreclosed" by law or the facts. *Barefoot*, 463 U.S. at 894. As far as the record shows, the Fourth Circuit, as did the Fifth Circuit in *Miller-El*, improperly denied certificate of appealability by finding the claims to be without merit or by imposing a more onerous standard than that required for the threshold

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[4] Similarly, the Second Circuit apparently issues summary orders denying an application for COA. *See Lewis v. McGinnis*, 04-cv-32 (2d Cir., 29 August 2008).

showing for a certificate of appealability.[5] If the Fourth Circuit adopted the district court's reasoning, it improperly engaged in a determination of the merits. *Miller-El*, 537 U.S. at 342. In reviewing an application for certificate of appealability, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.*

Had Mr. Hyatt filed his motion to vacate in the Fifth or Tenth Circuit, he would have received some measure of analysis explaining why the certificate of appealability was denied, as in *Medellin* and *Flournoy*. Instead, the Fourth Circuit's summary denial of certificate of appealability in this manner effectively turns the application for certificate of appealability into a petition for writ of certiorari. While the decision to take review on certiorari is discretionary, the decision to issue a certificate of appealability is not. Although § 2253 states that "certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right," *Miller-El*

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[5]The Fourth Circuit may read *Miller-El* as directing such summary dismissals. Before *Miller-El*, the Fourth Circuit issued written opinions stating the reasons for denying the application. *See Mueller v. Angelone*, 181 F.3d 557 (4th Cir. 1999) (denying COA and dismissing capital habeas appeal in 37-page opinion because issue "squarely foreclosed" by earlier opinion of the court). This practice appears to have been abandoned as a result of Justice Scalia's concurrence in *Miller-El*, wherein he cited specifically to the Fourth Circuit in noting that "some courts have simply allowed merits appeals to be taken *without* a COA-in flat contravention of 28 U.S.C. § 2253(c)(1)(A). *See, e.g. Bates v. Lee*, 308 F.3d 411 (CA4 2002)." *Miller-El*, 537 U.S. at 349, (Scalia, J., concurring). Apparently, further direction from this Court is needed.

makes clear that a petitioner who has made the requisite showing is entitled to the issuance of a certificate of appealability.

B. Mr. Hyatt met the low threshold for a certificate of appealability.

The standard for granting a certificate is low and has been clearly articulated. "A COA should issue if the applicant has 'made a substantial showing of the denial of a constitutional right,' which we have interpreted to require that the 'petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Tennard*, 542 US. at 282 (citations omitted). "A prisoner seeking COA [is not required] to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus.'" *Miller-El*, 537 U.S. at 338 (internal quotations omitted). The circuit must not adjudicate the merits of a claim in deciding whether to issue a COA. It "should not decline the application for a COA merely because it believes the applicant will not demonstrate entitlement to relief." *Id.* at 337. The question is merely whether "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

Here, the Fourth Circuit essentially ignored the requirements of *Tennard* and *Miller-El*. There is nothing in the record to show the court found the issues foreclosed as a matter of law. Moreover, given the astounding revelations in Mr. Kanstoroom's report [App. 43a-67a], the issues Mr. Hyatt raised

are debatable among jurists of reason and worthy of encouragement to proceed further. He deserved an opportunity to proceed further on the matter he raised in the district court.

He presented compelling, material evidence that he could not have discovered with due diligence. This evidence included information that (1) government witnesses mistakenly and erroneously testified that FEMA and its entities pay only for damages caused by direct water contact; (2) government witnesses mistakenly and erroneously testified that amounts paid to Mr. Hyatt exceeded permissible amounts or were unreasonably high, due to the intentional use of "low-ball" estimates by FEMA; (3) government witnesses inaccurately testified about water contact and pricing guidelines and gave the jury materially incorrect information about Mr. Hyatt; (4) much of the key information against Mr. Hyatt came from people without any training as an adjuster; (5) water contact is not a prerequisite for payment to cover hurricane and flood damage at the time of Mr. Hyatt's work, contrary to the explicit testimony of several government witnesses; (6) the automated software programs used to determine prices for reconstruction and replacement prices used in the industry are not uniform or even consistent, contrary to the explicit testimony of key government witnesses, as there is "a wide variation in prices that amounts to hundreds of percent;" (7) these "programs are often used to low-ball insurance claims," meaning "adjusters' 'approved prices' are often far lower than the fair price necessary to complete the repairs;" (8) these practices are "fraudulent;" and (9) it is "very

common for contractors [like Mr. Hyatt] to agree to perform work for whatever the insurance adjuster writes," meaning the approach used by Mr. Hyatt reflected the routine and accepted practice in the industry, which would categorically refute the government's inferential claim that Mr. Hyatt acted fraudulently. [App. 43a-67a]

Mr. Hyatt's claim that this evidence was material and would have resulted in an acquittal could be debated by reasonable jurists or is more than sufficient to justify encouraging him to proceed further, particularly where the district court ruled on a motion to dismiss, did not require a substantive response from the government, did not conduct an evidentiary hearing, and gave only the most cursory treatment of the newly discovered evidence. *See Raines v. United States,* 423 F.2d 526, 529 (4th Cir. 1970)(evidentiary hearing mandatory on section 2255 motion unless pleadings, files, and records show defendant entitles to no relief); *see also Humphries v. United States,* 2007 WL 1892114 (6th Cir. 2007)(issuing certificate of appealability and remanding for failure consider timing of motion under section 2255); *Hasan v. Galaza,* 254 F.3d 1150, 1154-55 (9th Cir. 2001)(issuing certificate of appealability and remanding for failure to make proper inquiry under section 2255). This Court should grant certiorari.

C. The New Evidence That Would Have Resulted in a Different Verdict.

As Mr. Hyatt explained in his section 2255 motion, Steven J. Kanstoroom, an expert in Pattern Recognition and Fraud Detection, prepared a "Summary of Newly Discovered Evidence in the Case of the United States of America v. Donald Kennelly and Kenneth Ray Hyatt" that he submitted to the Congressional Research Service on 19 November 2005. Mr. Hyatt first learned on this submission when Mr. Kanstoroom contacted him about it after Mr. Kanstoroom submitted the report. Mr. Kanstoroom did not believe he could release this information until he submitted it to the CRS. In summary, this significant report demonstrates the following critical findings germane to the government's case against Mr. Hyatt:

–government witnesses mistakenly and erroneously testified that FEMA and its entities pay only for damages caused by direct water contact;

–government witnesses mistakenly and erroneously testified that amounts paid to Mr. Hyatt exceeded permissible amounts or were unreasonably high, due to the intentional use of "low-ball" estimates by FEMA;

–government witnesses inaccurately testified about water contact and pricing guidelines and gave the jury materially incorrect information about Mr. Hyatt

–much of the key information against Mr. Hyatt came from people without any training as an adjuster;

– water contact is not a prerequisite for payment to cover hurricane and flood damage at the time of Mr. Hyatt's work, contrary to the explicit testimony of several government witnesses;

–the automated software programs used to determine prices for reconstruction and replacement prices used in the industry are not uniform or even consistent, contrary to the explicit testimony of key government witnesses;

–automated software programs "are often used to low-ball insurances claims" and "the adjusters' 'approved prices' are often far lower than the fair price necessary to complete the repairs.

Perhaps most important, Mr. Kanstoroom believed these practices are "fraudulent." [App. 30a-31a, 36a] He "found it very common for contractors [like Mr. Hyatt] to agree to perform work for whatever the insurance adjuster writes." This approach by Mr. Hyatt, which mirrored the routine and accepted practice in the industry, formed a central aspect of the government's inferential claim that he acted fraudulently. Mr. Kanstroroom's investigation demonstrably reveals the government's case was at best faulty and misleading and at worst false and fraudulent. Justice Kennedy recently observed for the Court "the imperative of correcting a fundamentally unjust conviction." *House*, 547 U.S.

at 536 (quoting *Engle v. Isaac*, 546 U.S. at 129). This case presents that "imperative."

Contrary to the rather summary analysis by the district court, which characterized the proffered new evidence as "vague," this newly discovered evidence bears directly on both the quality and legitimacy of the government's case against Mr. Hyatt. The district court engaged in little or no evaluation of this report other than this conclusive observation. [App. 8a-10a] The government has never responded to, disputed, or analyzed any particular aspect of this new information. The district court itself never discussed any of this specific information in this newly discovered evidence in the context of the trial evidence, which it had itself described as merely a "paucity" and virtually non-existent. *See Schlup*, 513 U.S. at 327 (new evidence compels relief if it makes it "more likely than not that no reasonable juror would have found [Mr. Hyatt] guilty beyond a reasonably doubt" if the evidence had been presented at trial).

The district court's omission of its own observations about the "paucity" quality and quantity of the evidence against Mr. Hyatt, as opposed to his co-defendant, is curious and reflects a failure to follow the teachings in *House v. Bell* and *Schlup v. Delo*. During the testimony of the FEMA agent who worked with the Inspector General for FEMA, the district court expressed its concerns with the government's proof of a conspiracy. Moreover, at the close of the government's case, the district court twice noted the "paucity of the evidence" of a connection between the defendants. At the close of

all the evidence, the district court again noted the "paucity of the evidence" and described the case as a "very, very close call." No direct evidence showed an illicit agreement between Mr. Hyatt and Mr. Kennelly. No evidence showed they knew each other before arriving at the scene of the hurricane. No evidence showed they ever met and discussed an illegal alliance after arriving in Kure Beach. No evidence showed Mr. Kennelly contrived to arrange for Mr. Hyatt's company to obtain the contract to make the repairs. No evidence showed Mr. Hyatt paid any bribe or kickback to Mr. Kennelly to get him to falsify his loss estimates. No evidence showed Mr. Hyatt ever engaged in intentional wrongdoing during his long, unblemished career. Against this backdrop, the new evidence is sufficiently substantial to require relief.

Mr. Hyatt's conviction rested on purely circumstantial evidence, another point wholly ignored by the district court yet critical to the materiality calculus. The newly discovered evidence from Mr. Kanstoroom's investigation, as described in his report, would have caused a different result at Mr. Hyatt's trial. Thus, it meets the test for "facts supporting the claim" under section 2255(4), contrary to the district court's conclusion and the Fourth Circuit's implicit agreement.

These new facts cast substantial doubt on the veracity of the government's case, not the mere credibility of its witnesses, particularly the process used by FEMA and its related entities to assess and pay for reconstruction after damage causes by hurricanes and floods. *See House*, 547 U.S. at 537 ("new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial") (citation omitted). These new facts show, in Mr. Kanstoroom's expert opinion, a substantial possibility that Mr. Hyatt was convicted based on materially misleading if not false testimony.

D. Mr. Hyatt Could Not Reasonably Have Discovered This Evidence at an Earlier Time.

This newly discovered evidence involved the result of an investigation by and report of Mr. Kanstoroom who conducted a comprehensive and exhaustive, two-year investigation into FEMA and many of its related entities to the Congressional Research Service. He felt this information could not have been obtained by Mr. Hyatt through the

exercise of reasonable diligence.[6] He himself did not believe he could divulge this material, much of which was secretive and obtained through "whistleblower" protection, to anyone until he presented it to the CRS on November 19.

Indeed, Mr. Hyatt could hardly have discovered them. These new facts were developed only through a comprehensive and thorough investigation of a government agency by a highly experienced and qualified expert in the detection of fraud. It required obtaining and reviewing "whistleblower" documents that would not be ordinarily available to a lay person.

Mr. Hyatt could not reasonably have obtained the facts supporting this motion until receiving Mr. Kanstoroom's report when it was disseminated to the CRS on 19 November 2005. *Moore v. Knight*, 368

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[6]Although the district court stated it assumed Mr. Hyatt could not have discovered this evidence and used "due diligence" [App. 12a], it suggested, but did not explain how or why, Mr. Hyatt's motion under section 2255 was not timely. [App. 12a] It did not cite a single case dealing with the applicable portion of section 2255(4). Section 2255(4) does not require the movant to exercise "the maximum feasible diligence, only 'due,' or reasonable diligence." *Locasico v. United States*, 395 F.3d 51, 55-56 (2d Cir. 2005). As *Locasico* points out, section 2255(4) is only triggered when the movant discovers the new facts. Mr. Hyatt could not have reasonably discovered these facts while incarcerated. *Avon v. United States*, 291 F.3d 708, 712 (11th Cir. 2002). Due diligence only requires reasonable efforts under the circumstances, not "the maximum feasible diligence." *Wims v. United States*, 225 F.3d 186, 190 n.4 (2d Cir. 2000); *accord Easterwood v. Champion*, 213 F.3d 1321, 1323-24 (10th Cir. 2000). The district court's ruling and the Fourth Circuit's tacit acceptance of it is at odds with the notions of due diligence in Second, Tenth, and Eleventh Circuits.

F.3d 936, 939 (7th Cir. 2004) (finding movant did not have requisite information to proceed under this section until receiving letter that contained necessary information to raise his claim). At that point, Mr. Hyatt had one year to file his motion to vacate. *DiCenzi v. Rose*, 452 F.3d 465, 470 (6th Cir. 2006). He timely acted with that one-year period. The Fourth Circuit's acceptance of the district court's denial of the motion on grounds that it was untimely is at odds with the Sixth and Seventh Circuits. At the very least, jurists of reason could debate the timeliness of the motion based on the newly discovered evidence not being material to the case

E. The Lower Court Erred in its Evaluation of the New Evidence.

The newly discovered evidence found by Mr. Kanstroroom bears directly on both the quality and credibility of the government's case against Mr. Hyatt. As such, it is the "new reliable evidence" that would have made it "more likely than not that no reasonable juror would have found [Mr. Hyatt guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 324, 327. It is not "merely cumulative of [the] impeachment and defense efforts at trial," as the district court summarily characterized it. [App. 11a] A brief review of the government's evidence demonstrates its critical significance and shows why the district court erred in denying Mr. Hyatt's motion to set aside the judgment against him.

The case rested on a theory that Mr. Hyatt and Donald Kennelly conspired to defraud FEMA by obtaining money to which they were not entitled in

connection with the reconstruction project at Ocean Dunes. In essence, the government claimed (1) Mr. Kennelly caused a competitor of the repair company to submit an unsuccessful bid for the Ocean Dunes project; (2) Mr. Kennelly caused Ocean Dunes to enter into a contract with the repair contractor; (3) Mr. Kennelly delivered insurance proofs of loss to Ocean Dunes knowing they would be submitted to NFIP for payment; (4) Mr. Kennelly delivered Ocean Dunes proofs of loss as claims for payment to INS; (5) Mr. Kennelly and Mr. Hyatt agreed to make repairs to numerous non-NFIP covered items which would be paid for from proceeds of the conspiracy; (6) Mr. Kennelly and Mr. Hyatt caused checks to be mailed that were payable to Mr. Hyatt and Coastal; and (7) Mr. Kennelly and Mr. Hyatt received proceeds from the allegedly fraudulent insurance filings.

At trial, the government also introduced evidence relating to the scope of flood insurance and the price of labor and material. The government claimed some of Mr. Kennelly's proofs of loss were improperly inflated through the use of unrealistically high prices for certain items included within them and that he submitted proofs of loss for items not actually covered by the insurance policies.

The government offered opinion evidence that flood insurance covers only that which is within the footprint of the insured building and the scope of flood insurance and the price of labor and materials covered by flood insurance is only the direct loss caused by flood waters. In preparation to testify about the prices of various repair items, at least one

witness reviewed Ocean Dunes files from the government but did not review the NFIP material or research the prices available in the aftermath of the hurricane. Rather, he simply remembered the prices he used when he worked as an adjuster after Hurricane Fran, six years before the trial.

In essence, the government claimed Mr. Hyatt, a contractor, conspired with Mr. Kennelly, an independent insurance adjuster, to defraud FEMA by obtaining money to which they were not entitled from funds paid by FEMA to repair hurricane damage to Ocean Dunes. However, no direct evidence showed an illicit agreement between Mr. Hyatt and Mr. Kennelly. No evidence showed they knew each other before arriving at the scene of the hurricane. No evidence showed they ever met and discussed an illegal alliance after arriving in Kure Beach. No evidence showed Mr. Kennelly contrived to arrange for Mr. Hyatt's company to obtain the contract to make the repairs. No evidence showed Mr. Hyatt paid any bribe or kickback to Mr. Kennelly to get him to falsify his loss estimates. No evidence showed Mr. Hyatt ever engaged in intentional wrongdoing during his long, unblemished career.

Mr. Hyatt's conviction rested on purely circumstantial evidence, which the district court recognized was essentially non-existent at trial. The newly discovered evidence submitted herein would have caused a different result at Mr. Hyatt's trial. These circumstances included: that Mr. Kennelly's loss estimates were too high, because he had improperly inflated the costs of some repairs and

included repairs which were not covered by the condominium's insurance policy; that Mr. Hyatt agreed to make all repairs covered by insurance, as well as certain other uncovered repairs and improvements, which is a typical and routine practice in this business; and that some of the repairs included in the loss estimates prepared by Mr. Kennelly were not done in the course of the actual reconstruction.

However, the evidence showed Mr. Kennelly came to the area from his home in New Orleans, Louisiana; Mr. Hyatt came to the area from his home in Texas. Not one of the many witnesses who were at Ocean Dunes during the post-Fran damage assessment and repair process saw or heard Mr. Kennelly and Mr. Hyatt have a conversation.

Mr. Hyatt intended to make money from the Ocean Dunes project. His company was to be paid the entire amount of flood and wind insurance proceeds for its efforts. He worked independently of Mr. Kennelly toward his goal. Mr. Hyatt would profit only if his company could complete the work he agreed to do for less than the amount of the insurance proceeds. Such uncertainty, otherwise known as risk, is not in any way unusual. This willing assumption of risk is common and completely legitimate. It does not even suggest criminal wrongdoing.

Mr. Kanstoroom's report contained findings material to Mr. Hyatt's defense of the charges, including (1) government witnesses mistakenly and erroneously testified that FEMA and its entities pay

only for damages caused by direct water contact; (2) government witnesses mistakenly and erroneously testified that amounts paid to Mr. Hyatt exceeded permissible amounts or were unreasonably high, due to the intentional use of "low-ball" estimates by FEMA; (3) government witnesses inaccurately testified about water contact and pricing guidelines and gave the jury materially incorrect information about Mr. Hyatt; (4) much of the key information against Mr. Hyatt came from people without any training as an adjuster; (5) water contact is not a prerequisite for payment to cover hurricane and flood damage at the time of Mr. Hyatt's work, contrary to the explicit testimony of several government witnesses; (6) the automated software programs used to determine prices for reconstruction and replacement prices used in the industry are not uniform or even consistent, contrary to the explicit testimony of key government witnesses. Rather, there is "a wide variation in prices that amounts to hundreds of percent." [App. 43a-67a] Mr. Kanstoroom found "such programs are often used to low-ball insurances claims" and provides the rationale for these tactics. As a result, "the adjusters' 'approved prices' are often far lower than the fair price necessary to complete the repairs." These practices are "fraudulent." [App. 36a] Mr. Kanstoroom "found it very common for contractors [like Mr. Hyatt] to agree to perform work for whatever the insurance adjuster writes." This approach by Mr. Hyatt, which mirrors the routine and accepted practice in the industry, formed a central aspect of the government's inferential claim that he acted fraudulently.

This newly discovered evidence casts substantial doubt on the veracity of the government's case and the process used by FEMA and its related entities to assess and pay for reconstruction and rebuilding after damage causes by hurricanes and floods. It presents "the imperative of correcting a fundamentally unjust conviction." *House*, 547 U.S. at 536. There exists a substantial possibility Mr. Hyatt was convicted based on materially misleading if not false testimony. *Schlup*, 513 U.S. at 327. Given the district court's own recognition of the "paucity" of evidence against Mr. Hyatt and characterization of the case itself as a "very, very close call," its rather cursory dismissal of this new evidence, without even a summary discussion of its content, strongly suggests the error in dismissing this action. The presentation of the information recently discovered by Mr. Kanstoroom might well have led a jury to render a different verdict. Under these circumstances, the Fourth Circuit erred in denying a certificate of appealability. This Court should grant a writ of certiorari.

CONCLUSION

For the reasons stated herein, Kenneth Ray Hyatt respectfully requests that the matter be summarily reversed with directions to issue a certificate of appealability or that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fourth Circuit.

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